HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

WITH the present number, the HARVARD LAW REVIEW begins its third year. In taking up the work which has been so worthily carried on by our predecessors, the members of the new board of editors feel that they are indeed assuming a heavy burden, and they purpose to spare no effort to maintain the high standard of the first two volumes. We shall pursue the same general policy as heretofore; and while not unmindful of the fact that our main object is to give to the public some idea of what has been accomplished under the Harvard system of instruction, we shall endeavor to make the REVIEW of interest not only to the student of law, but to the lawyer in practice; and to preserve, as far as possible, a fair balance between the theoretical and the practical. The departments relating peculiarly to the Law School will be continued as before. The department of Recent Cases will be conducted on the lines on which it has been developed during the past year. The more important and significant decisions will be abstracted, and brief comments and references added wherever practicable.

We recognize fully that the REVIEW has not yet passed from the experimental stage of its existence; but as we look back over its short history, we find much to encourage the hope that our enterprise is to succeed. The generous support of graduates and friends in contributing to our pages assures an ample supply of excellent material; and if our present subscribers continue to support us in the future as in the past, we feel that the REVIEW may soon become well established, and take a permanent place among our legal periodicals.

THE madness and death of the King of Bavaria has led Dr. Meurer, a *privat-docent* in the University of Breslau, to investigate the texts of the Canon Law and the histories of the Church to the end of

ascertaining what would happen if the Pope should go mad. His conclusion is, that not only the Pope cannot be deposed but not even can a coadjutor be named, as a regent is given to temporal princes. The only remedy is this: the college of cardinals may pronounce him insane on satisfactory evidence from physicians and may annul any acts which he does during this period of insanity. The result is, that the Pope remains in possession of his authority and dignity; and though he be hindered in the rights incident to his high position, there is no one who can take his place.

THE trial of the Bishop of Lincoln in the Archbishop of Canterbury's court will undoubtedly attract much attention among people interested in legal or religious matters. On the 12th of February the Right Rev. Dr. King, Bishop of Lincoln, was arraigned at Lambeth Palace before the Archbishop of Canterbury and the Bishops of London, Winchester, Oxford, and Salisbury, to answer to the charge of illegal ritualistic practices. Dr. King, in his own behalf, pleaded that he could not be tried before the bishops present, but only before the archbishop and the bishops of the province of Canterbury. The court then adjourned till the 12th of March.

The case is legally interesting as being the first of its kind since 1695, when Dr. Thomas Watson, Bishop of St. David's, was tried and convicted of simony and other crimes, and as punishment, was deprived of his authority and benefices. Later he was excommunicated for not paying the costs of this trial. In the case itself, and in the litigation in the courts of common law growing out of it, it seems to have been settled that an archbishop as metropolitan can deprive a suffragan bishop, though there is an appeal from the archbishop's decision in any particular case. For as to the archbishop's jurisdiction, the same contention appears to have been made as now awaits decision in the Bishop of Lincoln's case. The reason for the presence of other bishops sitting with the archbishop is not apparent, but they seem to be called rather as advisors than as judges. For example, it is said in the Bishop of St. David's case that the archbishop "called to his assistance six other bishops," though he gave sentence and deprivation in his own Latin over his own name.

AN opportunity has been given us of seeing the proof-sheets of the valuable collection of "Select Pleas of the Manorial and Other Seignorial Courts," which is to form the second volume of the Selden Society publications. It contains, among other things, an account of the Abbot of Ramsey's Court at the Fair of St. Ives (A.D. 1275). This is the first publication, we believe, of the records of such a court, — the "*pie poudre* court," which Blackstone tells us was a "court of record, incident to every fair and market." Its jurisdiction extended "to administer justice for all commercial injuries done in that very fair or market." The pleas selected by Mr. Maitland, touching, as they do, a great variety of petty dealings at the fair, are an interesting commentary on Lord Blackburn's suggestion[1] that the absence of mention in the early books of bills of exchange and other mercantile customs is to be explained by the fact that such cases were tried in the staple,—a later and

[1] Blackburn on Sales (first edition), 208.

more considerable "court merchant," of the same nature as these fair courts.

The subjects of the pleas, as we have said, are various, — breaches of the peace, false measures, and many cases of sales. Occasional touches have an effect of humor hardly intended; once, for example, instead of the one or two persons usually named as pledges, we find this: "And let him be in mercy for the unjust detainer; pledge, his overcoat (*supertunica sua*)." In one interesting case a woman complains of a monk, cellarer of the monastery of Kirkstead, who has refused to occupy or pay for a house which his predecessor hired for the use of the monks forever at fair time. He pleads that the former cellarer, not being a permanent officer of the monastery, had no authority to bind the abbot or any member of the house; but the answer is declared insufficient, because he "has made allegations about the legal position of his Abbot and his Prior and not his own legal position." On this case the editor has the following note:—

"The judgment seems to be due solely to a pleader's error in not sufficiently traversing the count; still the case shows a curious disregard of the line between breach of contract and delict. The cellarer is charged with breaking the peace by not paying a debt. Again, to raise another point, why was not this monk dead to the world? Did the exigencies of the Cistercian wool trade cause the courts merchant to disregard the ordinary rules about civil death? Lastly, observe the unusually heavy amercement. Is the court of a Benedictine abbot sorry when it catches a Cistercian in fault?"

In Mr. Maitland's introductory note he says: "How large a body of definite doctrine there was bearing the name 'law merchant' it is hard for us to say. Probably in some respects it took a more liberal and modern view of contractual obligations than that which was taken by the common law." To illustrate this, we are told that the extracts mention an obligatory writing payable to bearer, — a noteworthy circumstance in view of the date. It is believed, indeed, to be the earliest mention of such notes in England, though they were already known on the Continent.

ONE of the most interesting characters brought to notice in the recently published volumes of Lord Cockburn[1] is Robert McQueen, Lord Braxfield. As Lord Justice Clerk in Scotland, he tried most of the celebrated sedition trials growing out of the political excitement of the troubled years following the French Revolution. When it is remembered that it was this judge more than any other to whom was offered the opportunity of developing, almost of creating, the Scottish law of sedition, to whom fate intrusted the delicate task of pointing out the precise line between the proper exercise of the right of free public discussion and the criminal abuse of it in a time of political agitations and fears, Braxfield *seems* to be an important historical personage.

But it is personally that Braxfield is the most interesting. "Braxfield was a profound practical lawyer, and a powerful man; coarse and illiterate; of debauched habits, and of grosser talk than suited the taste even of his gross generation; utterly devoid of judicial decorum, and though pure in the administration of civil business where he was exposed to no temptation, with no other conception of principle in any

[1] Circuit Journeys, 1 vol. Trials for Sedition in Scotland, 2 vols. Edinburgh, 1888.

political case except that the upholding of his party was a duty attaching to his position. Over the five weak men who sat beside him, this coarse and dexterous ruffian predominated as he chose." He used to say to the faltering accusers, "Bring me prisoners and I'll find you law," — words that Jeffreys might have spoken, but not a judge. "Except Civil and Scotch Laws and probably two or three works of indecency, it may be doubted if he ever read a book in his life." He publicly thanked the jury for finding Muir guilty of sedition. "If there had been nothing but his own reason or conscience to restrain him, it is not easy to see what Braxfield would not have done." "His blamableness in these trials far exceeds that of his brethren. They were weak; he was strong. They were frightened; he was not. They followed; he, the head of the court, led." Not only that, but the port sometimes got a little the better of the judges toward the end of a long hearing. "Not that the ermine was absolutely intoxicated; but it was certainly very muzzy. The strong-headed ones stood it tolerably well." It must be added, in justice to the Lord Justice Clerk, that "Bacchus had never an easy victory over Braxfield."

So, after all, it is not strange that Braxfield has failed to become an important character in Scottish history in spite of his excellent opportunities. The miscarriage of justice that sent Muir and Gerrald to Botany Bay is infamy enough for one man. Nor has Braxfield's law stood the test of time any better than the verdict of his juries. "About thirty-five years after the trial [Muir's], I asked one of the jurymen how, on looking back, he could account to himself for his conduct. His answer was, '*We were all mad.*' A poor apology for a jury; none whatever for a court."

MANY readers of "The Hundredth Man" must have thought Mr. J. Weatherby Stull's Law Hospital a very fanciful notion, and yet the "American Law Review" describes as existing at Copenhagen a kind of law dispensary, where legal assistance is gratuitously furnished to poor and needy law patients. Two similar institutions are said to exist in America, — one in New York and one in St. Louis. But the best of it is, that the truth is better than the fiction; for while Mr. Stockton's creation is a hospital founded and endowed as the last act of selfishness, the hospital at Copenhagen is a true charity, supported bv young lawyers, who thus give their services to the poor for nothing. There is certainly no reason in the nature of things why lawyers should not be as charitable with their learning and skill as doctors — and perhaps they are; but at best their unselfishness is sadly unorganized.

IN 1778 Bathsheba Spooner, together with three men, was tried, convicted, and hanged for the murder of her husband.[1] No case in Massachusetts ever attracted greater attention in its day. At this time, when many of the feelings that once gave the case living interest are gone forever, the tale of the "Spooner Murder" is still often told with high local coloring and real feeling. The Parkman murder was not a more celebrated case. And it is no wonder. All elements of interest united to make a tale of romance from beginning to end, — politics, religion, love, infidelity, war, misfortune, and crime are mixed

[1] 2 Chandler's Criminal Trials, pp. 1-58.

into the tale. But it was left to the law to add a dark epilogue which turned romance into fearful reality.

It was only a few months after Burgoyne's surrender that a young American officer caught the attention of Mrs. Spooner, won her love and confidence. He was one of those that were hanged at Worcester. Hon. Timothy Ruggles, of Hardwick, was the father of Mrs. Spooner. He was a large landowner, a real lord of the manor, who kept extensive game parks and a stable of thirty or more saddle-horses; a lawyer, judge, politician, soldier, president of the First Continental Congress, and already, in 1778, an emigrated Tory. Hence the strong political feeling against Mrs. Spooner. After their conviction, the three men concerned in the murder "became mighty in the Scriptures, and were wont to make very pertinent remarks upon many passages that were mentioned to them." Days of fasting and prayer were observed in the effort to ward off the dire effects of such monstrous crimes from the community. Good Dr. Fiske, of Brookfield, preached a most feeling discourse on the day of the interment of Mr. Spooner.

But there is a point of great legal interest connected with the trial. While under sentence of hanging, Mrs. Spooner petitioned the governor and council for a respite on account of her pregnancy. The council issued to the sheriff a writ *de ventre inspiciendo*, ordering him to summon a jury of "two men midwives and twelve discreet and lawful matrons" to ascertain the truth of her plea. "The verdict of the above matrons is, that the said Bathsheba Spooner is not quick with child." Accordingly Mrs. Spooner was executed. But a post-mortem examination proved that her assertion had been true.

In Massachusetts there has been found no subsequent case in which a jury of matrons has been summoned, although there seems to be no evidence that such a jury is not still a part of the machinery of the courts of the State. It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner's case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had. It is not strange that the "Albany Law Journal" jeers at the Pennsylvania papers for suggesting that such a jury be summoned; "it is antiquated," is the taunt. It is possible, even, by an examination of the later cases, to discover a tendency to put questions of alleged pregnancy to doctors for decision. The writ in Mrs. Spooner's case, for example, added two "men midwives" to the twelve matrons,—a departure from common-law practice not entirely happy, however, if we judge by the result. The jury of women in Anne Wycherley's case[1] asked for and got the assistance of a surgeon. In New York the request for a jury of matrons was refused; but the circumstances of the case warranted the refusal without any reflection on the merit of the jury itself.[2] In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors.

[1] 8 C. & P. 262. [2] 39 Albany Law Journal, p. 161.